UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT B. LARABEE,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
DE-1221-19-0059-W-2

DATE: February 1, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

David J. Holdsworth, Esquire, Sandy, Utah, for the appellant.

Sandra K. Whittington, Esquire, Irving, Texas, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member
Member Leavitt recused himself and
did not participate in the adjudication of this appeal.

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which denied his request for corrective action in this individual right of action (IRA)

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

appeal. For the reasons discussed below, we GRANT the appellant's petition for review, REVERSE the initial decision IN PART, and GRANT the appellant's request for corrective action with respect to his 3-day suspension. We AFFIRM the initial decision insofar as it denied corrective action with respect to the appellant's receipt on July 26, 2018, of a No Contact Order (NCO).

BACKGROUND

¶2 The appellant has been employed by the agency as a Transportation Security Manager (TSM) at the Salt Lake City, Utah International Airport since 2007. MSPB Docket No. DE-1221-19-0059-W-2 (W-2 AF), Tab 33, Initial Decision (ID) at 3.[2] As a TSM, the appellant oversees the Supervisory Transportation Security Officers (STSOs). *Id.* During the relevant time, the appellant was supervised in March 2018 by Lead TSM M.C. and beginning in April 2018 by Lead TSM C.D.[3] *Id.* Above the Lead TSMs are Assistant Federal Security Directors (AFSDs), who are supervised by the Deputy Federal Security Director, up to the Federal Security Director (FSD). *Id.*

The Appellant's Protected Disclosures

¶3 In March 2018, several STSOs informed the appellant that they believed another TSM, TSM Doe,[4] had been violating standard operating procedures (SOPs) related to passenger screenings at security checkpoints. ID at 4. In response, the appellant disclosed the alleged SOP violations to Lead TSM M.C., approximately the second week of March 2018, who relayed the concerns to Lead

[2] The appellant's appeal was dismissed without prejudice at his request to allow him to exhaust an additional personnel action before the Office of Special Counsel and thereafter litigate his claims together before the Board. MSPB Docket No. DE-1221-19-0059-W-1, Initial Appeal File (IAF), Tabs 22-23.

[3] This change in supervision occurred as a result of Lead TSM M.C. being promoted to an Assistant Federal Security Director position. ID at 3.

[4] The administrative judge referred to this individual as Jane Doe instead of her real name to avoid "the gossip that caused problems for the agency and appellant." ID at 3 n.4.

TSM C.D.[5] *Id.* In March or April 2018, the appellant also disclosed TSM Doe's alleged SOP violations to AFSD R.S. ID at 5. On March 27, 2018, one of the STSOs also emailed the FSD on behalf of himself and several other STSOs to inform the FSD of the alleged SOP violations by TSM Doe. ID at 5; W-2 AF, Tab 12 at 111. In response, the FSD tasked AFSD R.S. to "look into" the alleged SOP violations. ID at 6. AFSD R.S. conducted "soft conversations" with the STSOs and TSM Doe and on April 16, 2018, AFSD R.S. emailed the FSD his findings that TSM Doe was switching lanes between Standard, Pre-Check, or Canine-enhanced screening (CES) without adjusting the proper settings for the Unpredictable Screening Process or notifying the STSOs, but that according to TSM Doe, the Leads or Desk Officer always confirmed the switch. *Id.*; W-2 AF, Tab 12 at 64-66. AFSD R.S.'s conversations with the STSOs also revealed that TSM Doe had poor relationships and communication issues with the STSOs. W-2 AF, Tab 12 at 64-66.

TSM Doe's Promotion and the Agency's Investigation into the Appellant's June 14, 2018 complaint regarding TSM Doe

¶4 In April 2018, the agency posted a vacancy announcement for a Lead TSM position, to which the appellant, TSM Doe, and another TSM, TSM K.D., among others, applied. ID at 6. TSM Doe and TSM K.D. were interviewed for the position, but the appellant was not. *Id.* Sometime after May 16, 2018, the appellant had a private conversation in the manager's office with TSM K.D. at the beginning of their work shift, during which they discussed the appellant's frustration with TSM Doe either being interviewed or selected for the Lead TSM position.[6] *Id.* During their conversation, the appellant referenced that TSM Doe had previously been arrested for driving under the influence (DUI) and that

[5] It is unclear whether Lead TSM C.D. learned at the time that the allegations came from the STSOs or the appellant. ID at 4.

[6] It is unclear from the record whether this conversation took place prior to TSM Doe being selected for the position or not.

several officers had seen a picture of TSM Doe's "chest," which had circulated among the officers on the floor. *Id.* According to the appellant, he "commented on how strange it seem[ed] that someone who has been arrested at work twice and has circulated inappropriate photos of herself throughout the workplace and who has continual violations of the SOPs has continued to be promoted." W-2 AF, Tab 14 at 57. TSM K.D. summarized their conversation as follows:

> [The appellant] was venting to me about the situation specifically not getting an interview for the Lead manager position and the fact that [TSM Doe] got the position. [The appellant] had mentioned her history of DUI and the photo for [sic] her chest. [The appellant] brought up the allegations recently reported by the supervisors at checkpoint 1. [The appellant] mentioned that [TSM Doe] had been arrest [sic] for a DUI and that several officers on the floor had seen a picture of her chest.

Id. at 82. On May 24, 2018, TSM Doe was selected for the Lead TSM position. ID at 7. On June 13, 2018, the appellant met with the FSD regarding his concerns with TSM Doe being selected for the Lead TSM position. *Id.* On June 14, 2018, the appellant followed up via an email to the FSD in which he informed the FSD he intended to file a discrimination complaint and raised various concerns regarding his nonselection for an interview and TSM Doe's selection for the position, including the following: (1) AFSD R.S.'s inquiry into TSM Doe's alleged SOP violations was inadequate; (2) the interview process was unfair, possibly discriminatory, and the agency improperly favored TSM Doe; (3) the appellant was troubled by TSM Doe's promotion because she had violated the SOPs, she was previously arrested at work twice for a DUI and for failure to pay traffic tickets and received only letters of reprimand for each incident, even though progressive discipline should have been taken, and TSM Doe was rumored to have emailed a picture of her breasts to many on the screening workforce on multiple occasions, and although the appellant had not seen the photos, many officers and supervisors had told him about them. W-2 AF, Tab 12 at 26-34. The appellant requested an independent investigation into his allegations. *Id.* at 33.

¶5 On June 15, 2018, the FSD appointed S.T., a Deputy FSD from outside of the state of Utah, to conduct an investigation into the appellant's concerns. *Id.* at 21. Such concerns were characterized for purposes of the investigation as "Did TSA Screening Leadership discriminate against [the appellant] based on his age, Standard Operating Procedures (SOP) violations, religion, and work experience." *Id.* at 15. Investigator S.T. interviewed numerous employees and on July 25, 2018, he issued a report concluding the following: (1) the appellant was not discriminated against based on his identified protected classes when he was not interviewed for the Lead TSM position; (2) TSM Doe was provided with Official TSA interview questions approximately 2 years ago, but there was no evidence that she received an unfair advantage in the interview process for the May 2018 Lead TSM vacancy; (3) on multiple occasions, TSM Doe acted in an inappropriate manner which would be in violation of the TSA's Employee Responsibilities and Code of Conduct; and (4) the agency's prior investigation regarding the alleged SOP violations by TSM Doe was inadequate and failed to gather the necessary evidence.[7] *Id.* at 17-18. The report recommended the following: (1) Require TSM Doe to review TSA MD 1100.73-5, Handbook Employee Responsibilities and Code of Conduct, Sections I and M; (2) Issue TSM Doe a letter of counseling on her inappropriate comments and conduct; (3) assign remedial training to TSM Doe that focuses on interpersonal communications, stress management, team building, and how to provide constructive feedback; and (4) if another allegation of misconduct is reported concerning TSM Doe, ensure thorough fact-finding is completed; if the allegation is validated, take immediate disciplinary action. *Id.* at 18.

[7] The investigation did not address the appellant's concerns regarding TSM Doe's prior DUI and photograph.

TSM Doe's Complaint Against the Appellant and the Agency's Investigation

¶6 On or before July 13, 2018, TSM Doe[8] informed AFSD C.V. that she felt uncomfortable working with the appellant. ID at 8. On July 13, 2018, AFSD C.V. and TSM Doe met with the FSD to discuss TSM Doe's concerns regarding the appellant, which included that since her promotion to Lead TSM, her conversations with the appellant had become heated and felt potentially aggressive to her. ID at 9. During this conversation the FSD informed TSM Doe "about the allegations [he] was made aware of regarding a photo some employees may possess or may have seen that showed her exposed breasts." *Id.* On July 19, 2018, TSM Doe filed a written complaint titled "Sexual Harassment / Hostile Work Environment." *Id.*; W-2 AF, Tab 11 at 16-17. In her complaint, TSM Doe reported that the appellant was speaking to staff about her DUI and claiming to have seen a photograph of her breasts, she was not comfortable being in the same room as him, and she feared what his next actions would be. W-2 AF, Tab 11 at 16-17. On July 26, 2018, Deputy FSD G.G. appointed D.S., an Assistant FSD of Inspections at the Salt Lake City airport to conduct an investigation into TSM Doe's allegations. *Id.* at 13. Investigator D.S. conducted interviews of numerous employees and concluded the following regarding the photograph: (1) the evidence did not support a finding that the appellant had seen or possessed a photograph of TSM Doe's breasts or was telling other employees he had seen such a photograph; (2) the appellant had been told about the photograph by other Transportation Security Officers (TSOs) and STSOs; (3) the appellant told TSM K.D. about the photograph of TSM Doe's "chest"; and (4) many employees were aware of the photograph and there was no evidence that they had made any efforts to stop the discussion or dissemination of the photograph.[9] *Id.* at 8-11.

[8] Although at this point TSM Doe had been promoted to Lead TSM as of May 24, 2018, for consistency we refer to her as TSM Doe throughout this decision.

[9] Employees do not appear to have been specifically asked if they reported the photograph at the time of the incident many years ago or at any point thereafter. W-2

Investigator D.S. concluded the following regarding TSM Doe's DUI: (1) the DUI and arrest of TSM Doe were common knowledge among TSA employees and TSM Doe talked openly about her DUI; (2) the appellant was involved in one documented conversation about the DUI; and (3) there was no evidence that the appellant or many other employees attempted to quash rumors about TMS Doe's DUI. *Id.* at 10-11. Investigator D.S. also concluded that no employees admitted to being asked or persuaded by the appellant to make disparaging comments about TSM Doe. *Id.* at 10. Investigator D.S.'s report did not make any recommendations. *Id.* at 12.

The Appellant's Discipline

¶7 On July 26, 2018, the same day that Investigator D.S. was appointed to investigate TSM Doe's allegations of harassment by the appellant, AFSD C.V. issued the appellant an NCO which informed him that an allegation had been made concerning his conduct towards TSM Doe and instructed him to immediately cease and desist from any verbal or physical offensive or unwanted conduct as well as directed the appellant not to have any contact with TSM Doe or other officers until further notice. ID at 9-10; W-2 AF, Tab 11 at 19-20. AFSD C.V. also informed the appellant that, as a result of the NCO, he would be transferred to the Regulatory group. ID at 10. Following Investigator D.S.'s August 30, 2018 report of investigation into TSM Doe's harassment complaint, on November 30, 2018, Lead TSM C.D. issued the appellant a notice of proposed 3-day suspension based on two charges: (1) Discourteous Conduct; and (2) Inappropriate Comments of a Sexual Nature. W-2 AF, Tab 14 at 61-67. Both charges were based on the appellant's private conversation with TSM K.D. on or about May 16, 2018, during which he expressed his displeasure that TSM Doe had been selected for an interview or for the position and mentioned her prior

---

AF, Tab 11 at 31-136. According to the appellant he did report the photograph up the chain of command in the past. *Id.* at 83.

DUI and the photograph of TSM Doe's chest. *Id.* at 61. After affording the appellant an opportunity to respond, *id.* at 57-59, on December 17, 2018, AFSD R.S. issued a decision sustaining both charges and suspending the appellant for 3 days, *id.* at 47-55.

Procedural History

¶8 The appellant filed a Board appeal alleging that the agency's decision to issue him the July 26, 2018 NCO and suspend him for 3 days constituted reprisal for his prior protected disclosures.[10] W-2 AF, Tab 1. After holding the appellant's requested hearing, the administrative judge issued an initial decision denying the appellant's request for corrective action. ID at 1. The administrative judge found that the appellant met his burden of proving that he made protected disclosures concerning TSM Doe's alleged SOP violations between March and June 2018, and that such protected disclosures were a contributing factor in the agency's July 26, 2018 issuance of the NCO and December 17, 2018 decision to suspend him for 3 days. ID at 12-18. However, the administrative judge found that the agency proved by clear and convincing evidence that it would have issued the NCO and the 3-day suspension absent the appellant's protected disclosures. ID at 19-28.

¶9 The appellant has filed a petition for review in which he disputes in detail the findings in the initial decision, which largely amounts to a challenge to the administrative judge's clear and convincing analysis.[11] Petition for Review (PFR)

[10] Although the appellant initially alleged that the agency's decision to reassign him as a result of the NCO also constituted whistleblower reprisal, a claim over which the administrative judge found jurisdiction, the appellant subsequently clarified that he was only challenging the agency's NCO and 3-day suspension. ID at 2 n.1.

[11] With his petition, the appellant has submitted various additional documents, many of which are part of the record below. PFR File, Tab 1 at 19-43; W-2 AF, Tab 8 at 60-66, Tab 22 at 10-14, Tab 14 at 86-89. However, to the extent such documents are not part of the record below, we have not considered them because the appellant has not asserted or shown that such documents are based on new or material information not previously

File, Tab 1. The agency has opposed the appellant's petition, and the appellant has filed a reply. PFR File, Tabs 4-5.

DISCUSSION OF ARGUMENTS ON REVIEW

¶10 To obtain corrective action in an IRA appeal, the appellant must meet his initial burden of establishing by preponderant evidence that his protected disclosure was a contributing factor in the personnel actions in dispute. 5 U.S.C. § 1221(e)(1); *Elder v. Department of the Air Force*, 124 M.S.P.R. 12, ¶ 39 (2016). Here, the administrative judge found that the appellant met his burden by proving by preponderant evidence that his protected disclosures concerning TSM Doe's alleged SOP violations were a contributing factor in the agency's decision to issue him the NCO and suspend him for 3 days.[12] ID at 12-18. Thus, the burden then shifted to the agency to establish by clear and convincing evidence that it would have taken those same personnel actions absent the

---

available, despite his due diligence, when the record closed. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980); 5 C.F.R. § 1201.115(d).

[12] On review, the appellant questions why the administrative judge did not consider his additional reports of misconduct by TSM Doe as protected disclosures. PFR File, Tab 1 at 4, 7. The appellant also requests that the Board review whether the administrative judge properly denied his request for reconsideration of the jurisdictional rulings, but does not explain how such a request established error in the administrative judge's findings. *Id.* at 17-18. To the extent the appellant is challenging the administrative judge's jurisdictional rulings, we find that his conclusory assertions on review fail to establish error in the administrative judge's findings. *See, e.g.*, *Mulroy v. Office of Personnel Management*, 92 M.S.P.R. 404, ¶ 11 (2002) (finding that the appellant's petition for review did not meet the Board's criteria for review because he did not explain how or why the administrative judge erred), *overruled on other grounds by Clark v. Office of Personnel Management*, 120 M.S.P.R. 440 (2013). Additionally, even assuming the administrative judge erred in finding the appellant's motion for reconsideration untimely, the appellant's motion did not explain or address the basis for his belief that he reasonably believed that his additional alleged protected disclosures evidenced any of the categories of wrongdoing under 5 U.S.C. § 2302(b)(8). W-2 AF, Tab 22; *see Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (stating that an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal).

appellant's protected disclosures. 5 U.S.C. § 1221(e)(2); *Elder*, 124 M.S.P.R. 12, ¶ 39. Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established; it is a higher standard than preponderant evidence. 5 C.F.R. § 1209.4(e). In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶ 16 (2012).

The agency proved by clear and convincing evidence that it would have issued the appellant an NCO absent his protected disclosures.

¶11 As an initial matter, the administrative judge did not address whether the agency's NCO amounted to a personnel action within the meaning of 5 U.S.C. § 2302(a)(2). As a result of the agency's NCO the appellant was transferred to the SLC Regulatory group that same day. ID at 10. A detail, transfer, or reassignment is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iv). However, according to the administrative judge, the appellant withdrew his claim that the agency's decision to reassign him constituted reprisal for his protected disclosures. ID at 2 n.1. Assuming without deciding that the agency's decision to issue the NCO alone amounted to a personnel action, we discern no error in the administrative judge's finding that the agency would have issued the NCO absent the appellant's protected disclosures. ID at 20-23. In particular, the administrative judge found that the agency had legitimate reasons for issuing the NCO while it conducted an investigation into TSM Doe's allegations of

harassment. ID at 20. Even the appellant acknowledges on review that the agency "had every right and [was] obligated to separate [TSM] Doe and [himself]" because "at the time [TSM] Doe made her [hostile work environment] statement against [him] the agency could not have known if [TSM Doe's] allegations against [him] were true and they would have been required to take action to separate us per MD [Management Directive] 1100.73.3." PFR File, Tab 1 at 9. We agree with the administrative judge that, although TSM Doe had a motive to retaliate against the appellant, such motive was outweighed by the agency's legitimate need to separate the appellant until it could conduct an investigation into TSM Doe's allegations. ID at 22-23. On review, the appellant raises various arguments that the agency's NCO was not reasonable, violated his rights, and exceeded the agency's authority based on, among other things, the specific language which he contends was unclear and failed to inform him of the specific allegations against him. PFR File, Tab 1 at 10-11. However, in an IRA appeal, the Board lacks jurisdiction to adjudicate the merits of or the procedures used to effect the agency's underlying personnel action; rather the relevant inquiry is whether the agency had strong evidence to support its personnel actions. *See, e.g.*, *Phillips v. Department of Transportation*, 113 M.S.P.R. 73, ¶ 15 (2010); *Ramos v. Department of the Treasury*, 72 M.S.P.R. 235, 240 (1996). Thus, such arguments fail to establish any error in the administrative judge's findings that the agency had strong evidence in support of its decision to issue the NCO, which outweighed any motive to retaliate, and, thus, the agency met its clear and convincing burden with respect to its decision to issue the NCO.

The agency failed to prove by clear and convincing evidence that it would have issued the appellant a 3-day suspension absent his protected disclosures.

¶12 Regarding *Carr* factor 1, the strength of the agency's evidence in support of its decision to suspend the appellant for 3 days, the administrative judge found that the agency had strong evidence that the appellant remarked to TSM K.D. concerning TSM Doe's prior DUI and her rumored "chest" photograph, and that

such comments violated multiple agency codes of conduct, including the requirement that the appellant, as a manager, provide positive leadership and ensure a hospitable workplace. ID at 23. On review, the appellant disputes that his comments to TSM K.D. were improper or amounted to misconduct. PFR File, Tab 1 at 5. He also reiterates his argument that TSM Doe's harassment complaint, which led to his investigation and 3-day suspension, was motivated by reprisal for his protected disclosures concerning her alleged SOP violations as evidenced by the fact that her harassment claims were shifting and unclear, unsupported, and lacked merit. *Id.* at 4-6.

¶13 We agree with the appellant that his comments to TSM K.D. do not provide strong evidence for the agency's decision to discipline him. The administrative judge did not make any specific findings to support his cursory conclusion that the appellant's statements violated multiple agency codes of conduct. Nor did he consider the context in which the appellant's comments were made. The record before the agency at the time it proposed and decided the appellant's 3-day suspension does not support a conclusion that the appellant's comments amounted to "Discourteous Conduct" or "Inappropriate Comments of a Sexual Nature." We note that the appellant's comments were not made directly to TSM Doe, as is often the case for similar charges. The agency appears to have viewed the appellant's comments to TSM K.D. as improper because he was "involved" in the incidents that led to TSM Doe's harassment complaint and because his actions led to TSM Doe feeling that "she was experiencing a hostile work environment, in part because . . . employees [were] claiming to have seen a picture of her breasts." W-2 AF, Tab 14 at 51. However, the evidence does not show that the appellant ever claimed to have seen the photograph or that TSM Doe was aware of the appellant's private comments to TSM K.D., such that his comments could have contributed to TSM Doe feeling harassed. W-2 AF, Tab 11 at 8. The proposing official testified that he did not have any evidence that TSM K.D. informed TSM Doe of the appellant's comments. Hearing Transcript (HT)

at 80-83 (Jan. 29, 2020). Similarly, TSM K.D. testified that she never informed anyone of the appellant's comments except the investigator during the agency's investigation into TSM Doe's complaint. HT at 227-29 (Jan. 28, 2020).

¶14 Rather, the record reflects that, according to TSM Doe, it was the FSD who informed her that the appellant had seen a photograph of her breasts and was making disparaging comments about her to other employees by talking about her prior DUI. W-2 AF, Tab 11 at 51-52. Such information appears to have been an inaccurate summary of the FSD's conversation with the appellant on June 13, 2018, when they met to discuss the appellant's concerns about TSM Doe being promoted and the appellant's perception that she had received a pattern of preferential treatment with respect to promotions and lenient discipline. During the course of the agency's investigation into TSM Doe's harassment complaint, the FSD explained how he had mistakenly summarized his conversation with the appellant when he met with TSM Doe regarding her harassment complaint. According to the FSD, on July 13, 2018, he mistakenly informed TSM Doe that the appellant had seen a photograph showing her exposed breasts, but after reviewing his notes regarding his July 13, 2018 conversation with the appellant, he met with TSM Doe and corrected such misinformation by informing her that the appellant had actually indicated that he heard about the photograph, but did not tell the FSD that he had personally seen it. *Id.* at 18. According to the FSD, he did not otherwise tell TSM Doe that the appellant was making disparaging comments about her, but rather had simply informed the appellant that if he was making disparaging comments about TSM Doe to anyone, he needed to cease immediately. *Id.* Thus, the appellant's private comments to TSM K.D., of which TSM Doe was not aware, could not have contributed to TSM Doe's belief or feeling that she was experiencing a hostile work environment due to employees discussing or claiming to have seen a picture of her breasts as the agency apparently determined.

¶15 Similarly, the record does not reflect that TSM Doe had strong evidence in support of her harassment claims, which led to an investigation of the appellant and his 3-day suspension. *See Russell v. Department of Justice*, 76 M.S.P.R. 317, 323-24 (1997) (stating that it is proper to consider evidence regarding an investigation if it is so closely related to a personnel action that it could have been pretext for gathering evidence to retaliate against an employee for whistleblowing); *see also Mangano v. Department of Veterans Affairs*, 109 M.S.P.R. 658, ¶ 44 (2008) (finding that an investigation could have been a pretext for retaliation when it was convened by the agency official who was the subject of the appellant's whistleblowing). TSM Doe's allegations of harassment were shifting and unsubstantiated by other employees. For example, in her written complaint, TSM Doe alleged that she felt harassed because the appellant had made disparaging comments about her to other TSMs and to STSOs at checkpoint 1, the appellant had seen a picture of her breasts, and the appellant was allegedly telling the STSOs that they should make claims against her that she was rude, yelled at them and prevented them from doing their jobs. W-2 AF, Tab 11 at 16. However, when asked to describe the harassment in her affidavit, TSM Doe identified other general workplace issues, such as work-related texts and discussions with the appellant, as the source of the appellant's alleged harassment, failed to identify specific disparaging comments she alleged the appellant made to other employees or who told her the appellant was allegedly making them, with the exception of the inaccurate comments she heard from the FSD. *Id.* at 49-52. Affidavits from other TSOs and STSOs interviewed did not support TSM Doe's contention that the appellant was discussing her DUI or the photograph, making other disparaging comments about her, or otherwise harassing her. *Id.* at 44-136. Rather they reflect that both TSM Doe's prior DUI and photograph occurred sometime approximately 5 to 10 years ago and were common knowledge among many employees, and the issues appear to have resurfaced as a result of TSM Doe's recent promotion. *Id.* at 8-11, 74, 112, 117,

130. Significantly, according to numerous employees, TSM Doe talked openly about her DUI and is alleged to have sent the photograph of her breasts to employees herself many years ago or was at least aware that it was being shared, and "thought it was funny and no big deal" at the time. *Id.* at 10, 44-45, 69.

¶16 Moreover, the record reflects that the appellant's comments to TSM K.D. were not made to disparage or harass TSM Doe as the agency found, but rather in the context of the appellant expressing his frustration concerning perceived favoritism, preferential treatment, and/or the unfairness of TSM Doe being interviewed and/or selected for the Lead TSM position.[13] W-2 AF, Tab 14 at 48 (noting that there was "no other reason for [the appellant's] comments regarding [TSM Doe's] arrests, except to disparage her to [his] coworker"). In her affidavit TSM K.D. stated that she did not view the appellant's comments as disparaging and noted that the appellant did not agree with the situation and had notified those in his chain of command and filed a grievance about it. *Id.* at 82-84. The fact that the appellant mentioned TSM Doe's prior DUI and photograph as examples, among other reasons why he felt TSM Doe had improperly received preferential treatment and should not have been selected for the position does not provide strong evidence that the appellant made inappropriate comments of a sexual nature or engaged in discourteous conduct. The appellant privately discussed these concerns with his peer, TSM K.D., and shortly thereafter raised his same concerns with the FSD verbally and in writing, which resulted in the agency's investigation regarding the interview process and TSM Doe's alleged misconduct.

¶17 Moreover, the agency's own investigation into TSM Doe's harassment complaint shows that the appellant's perception that TSM Doe received

[13] Although the proposing official questioned the appellant prior to making his decision to propose the appellant's 3-day suspension, the proposing official testified that he did not seek any additional information from TSM K.D. regarding the context of her conversation with the appellant after reviewing the results of Investigator D.S.'s Investigation. HT at 76-80 (Jan. 29, 2020).

preferential treatment was shared by other employees who similarly vented to TSM K.D. about the situation. W-2 AF, Tab 11 at 39; 98-99, 130. TSM K.D. herself also appears to have believed that there was truth to some of the appellant's allegations. *Id.* at 39. Rather than the appellant's behavior being the issue, employees largely had issues working with TSM Doe or perceived that management treated her more leniently by failing to sufficiently investigate and discipline her appropriately for her alleged misconduct, including the alleged SOP violations reported by the appellant and others, and instead promoted her. *Id.* at 39, 98-99. The results of Investigator S.T.'s investigation into the appellant's claims lend support to this perception to the extent it concluded the following: (1) AFSD R.S.'s investigation into TSM Doe's alleged SOP violations "was inadequate and failed to gather the necessary evidence to support the allegation by [the appellant]"; and (2) although TSM Doe was not afforded preferential treatment in connection with her promotion to the Lead TSM position, she may have previously been provided preferential treatment in connection with a prior interview in which she received official TSA interview questions in advance. W-2 AF, Tab 12 at 17-18. Notably, S.T.'s investigation, while finding the prior investigation of the alleged SOP violations insufficient, similarly did not gather the information to ascertain whether there was any merit to the alleged SOP violations and instead recommended that if another report of misconduct was made against TSM Doe, it be investigated thoroughly. Thus, it appears the agency never sufficiently investigated the alleged SOP violations that formed the basis of the appellant's protected disclosures, and instead promoted TSM Doe. Investigator S.T. did not investigate the circumstances surrounding TSM Doe's prior DUI or photograph, but he did find that she had engaged in additional misconduct, including raising her voice and berating TSA employees. *Id.* Thus, based on his recommendation, TSM Doe received a letter of counseling for her misconduct. *Id.* at 6, 18.

¶18 In light of the conclusions of AFSD R.S.'s, Investigator S.T.'s, and Investigator D.S.'s investigations, we find it difficult to reconcile the agency's lack of sufficient investigation into TSM Doe's alleged SOP violations, its treatment of the appellant compared to TSM Doe, or its rationale for issuing the appellant a 3-day suspension and TSM Doe a nondisciplinary letter of counseling. *See Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 30, (2011) (stating that it behooves an agency, when faced with the "clear and convincing evidence" standard, to fully explain all of its potentially questionable actions to meet that burden).

¶19 Regarding the second *Carr* factor, the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision, we agree with the administrative judge that TSM Doe had a strong motive to retaliate against the appellant for his disclosure of her alleged SOP violations and that her July 19, 2018 complaint significantly contributed to the agency's decision to issue the 3-day suspension. ID at 25; *see Whitmore v. Department of Labo*r, 680 F.3d 1353, 1371 (Fed. Cir. 2012) (when applying the second *Carr* factor, the Board will consider any motive to retaliate on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision); *Russell*, 76 M.S.P.R. at 326 (finding that agency officials had a motive to retaliate because they were the subjects of the appellant's protected activity, they were the subjects of an investigation due to the appellant's protected disclosure, and knew about the appellant's protected disclosure when they reported the appellant for an investigation that formed the basis of the appellant's charged misconduct).

¶20 The record reflects that TSM Doe began complaining about the appellant's alleged harassment 2 weeks after she was interviewed in connection with the agency's investigation concerning the appellant's allegations, which included the appellant's protected disclosures regarding TSM Doe's alleged SOP violations. As the administrative judge found, TSM Doe was likely aware that the appellant

had accused her of violating SOPs by the time of her June 28, 2018 interview because, during that interview, TSM Doe was informed that the investigator "was conducting an Informal Administrative Inquiry based on allegations received from [the appellant]" and asked whether she had ever violated SOPs. ID at 16, 18; W-2 AF, Tab 12 at 78-79. During her June 28, 2018 interview, TSM Doe was also asked whether she believed she had a good working relationship with the appellant, to which she responded:

> I believe I do. I don't know of any reason why I wouldn't. We've had our moments where we disagree or had some rough moments. There was a specific instance where he called me and wanted to run CES and I said no. He was running cameras (Closed Circuit Television (CCTV)) and said that we needed to do it. I told him "No this is my checkpoint and I will run it the way I want to!" Was I disrespectful, yes. But I did apologize later and when the I bands came in I let them know immediately that it happened. I don't feel like he (Bryce) was able to let it go. I don't think he likes people who disagree with him. He has pushed back and raised his voice to me and told me to do things. He has walked all over me. He is used to people doing what he says and when someone doesn't or pushes back it's something he holds onto.

W-2 AF, Tab 12 at 79. Notwithstanding this response, 2 weeks later, on July 13, 2018, TSM Doe reported to her superiors how "extremely uncomfortable" she was working with the appellant and that she began to feel harassed by the appellant after she was promoted to the Lead TSM position on May 24, 2018, and shortly thereafter on July 19, 2018, she filed her harassment complaint. ID at 8; HT at 8 (Jan. 29, 2020) (testimony of AFSD C.V. that TSM Doe reported her concerns regarding the appellant the same day or 24 hours prior to when they met with the FSD on July 13, 2018). Additionally, in her affidavit in support of her sexual harassment complaint, TSM Doe stated that she felt harassed by the appellant in part because "the false claims against her were explored in an earlier investigation," which we construe as a reference to the investigation by Investigator S.T. into the appellant's allegations that included, among other things, TSM Doe's alleged SOP violations. W-2 AF, Tab 11 at 51. Thus, the

timing of TSM Doe's complaint closely following TSM Doe learning of the appellant's protected disclosures related to her alleged SOP violations as well as the additional circumstantial evidence in the record, including TSM Doe's shifting explanation of the appellant's alleged harassment and reference to his claims made against her, suggest that TSM Doe's harassment complaint was motivated by reprisal for the appellant's protected disclosures. *See Chambers*, 116 M.S.P.R. 17, ¶¶ 58, 66 (noting that because direct evidence of a retaliatory motive is rare, circumstantial evidence may be relied on to give rise to an inference of impermissible intent, and finding that the timing of the agency's personnel action shortly after the appellant's protected disclosures suggested that the agency was motivated to retaliate).

¶21 We also disagree with the administrative judge's finding that Lead TSM C.D., the proposing official, had no motive to retaliate and instead we find that both the proposing and deciding officials as well as the FSD may have had some motive to retaliate to the extent the appellant's disclosure reflected upon them as managers.[14] *See Whitmore*, 680 F.3d at 1370 (stating that those responsible for the agency's performance overall may well be motivated to retaliate even if they are not directly implicated by the disclosures, and even if they do not know the whistleblower personally, as the criticism reflects on them in their capacities as managers and employees); *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 69 (finding motive to retaliate because the proposing and deciding officials were high level officials and the disclosures "reflected on both of them as representatives of the general institutional interests of the

[14] Although the administrative judge found that the deciding official had a motive to retaliate, we disagree with his reasoning that such a motive stemmed from the appellant's report that the deciding official did not conduct a thorough investigation into the appellant's disclosure concerning TSM Doe's alleged SOP violations. ID at 26. The appellant's June 13-14, 2018 reports to the FSD regarding the insufficiency of the prior investigation were not alleged protected disclosures at issue in this appeal, such that they could have provided the deciding official with a motive to retaliate. W-2 AF, Tab 18; IAF, Tab 19.

agency"). Here, the proposing official, Lead TSM C.D., was TSM Doe's supervisor, W-2 AF, Tab 12 at 66, and, thus, the appellant's report concerning TSM Doe's alleged misconduct in violating SOPs could have reflected poorly upon him as a manager. Similarly, the deciding official AFSD R.S. was a level above and supervised the Lead TSMs, such that the appellant's disclosure could have similarly reflected poorly upon him. ID at 3. Additionally, such disclosures could have also reflected poorly upon the FSD, who was the highest ranking individual and had the primary responsibility of ensuring the security of transportation modes throughout the state of Utah. ID at 3; HT at 179 (Jan. 28, 2020).

¶22 Regarding the third *Carr* factor, we find insufficient evidence in the record concerning whether the agency took similar actions against other similarly situated employees who were not whistleblowers. As discussed in *Carr* factor 2, the agency's investigation concerning TSM Doe's harassment complaint revealed that many TSOs and STSOs had discussed TSM Doe's prior DUI and photograph at some point in time, that such issues were common knowledge, employees had viewed TSM Doe's mug shots regarding her DUI, employees had viewed and circulated the chest photograph, with one employee having had the photograph confiscated from his locker by the investigator. W-2 AF, Tab 11 at 8-11, 44-136. However, the record is not developed concerning the specific discipline, if any, issued to these individuals or whether such employees were also whistleblowers. Although the deciding official briefly testified that some of these individuals may have been disciplined, he could not recall the details surrounding any such discipline. HT at 267-68 (Jan. 28, 2020). Thus, the circumstances, including the proposing and deciding officials and the nature of the charges or penalties imposed, are too unclear to make a meaningful comparison. *See Whitmore*, 680 F.3d at 1373-74 (noting that differences in kinds and degrees of conduct between otherwise similarly situated persons within an agency can and should be accounted for to arrive at a well-reasoned conclusion regarding *Carr* factor 3).

Similarly, although the proposing official also testified that he proposed discipline for other employees for discussing the photograph, possessing the photograph, and failing to report the discussion of the photograph, he did not identify which employees or the nature of the charged misconduct or the specific penalties proposed. HT at 71 (Jan. 29, 2020).

¶23 Finally, the administrative judge considered TSM K.D. as a comparator and determined that there was some evidence that the agency took a similar action against her by issuing her a letter of counseling for failing to report the appellant's May 16, 2018 comments to her about TSM Doe's DUI and photograph. ID at 27. However, it is unclear whether TSM K.D. is a proper comparator to the extent she may have also engaged in protected whistleblowing. *See, e.g.*, *Siler v. Environmental Protection Agency*, 908 F.3d. 1291, 1299 (Fed. Cir. 2018) (noting that *Carr* factor 3 focuses on the agency's treatment of *non-whistleblower* employees accused of similar misconduct). The record reflects that on July 1, 2018, TSM K.D. reported to Investigator S.T. that she believed that TSM Doe had previously been given an unfair advantage in competing for a prior position and that, notwithstanding her reports at the time, agency leadership ignored her concerns and determined there was nothing improper about TSM Doe receiving the questions. W-2 AF, Tab 12 at 52-54. Accordingly, in light of the lack of clarity of evidence relevant to *Carr* factor 3, we find it is not a significant factor in the Board's analysis. Nonetheless, while the agency does not have an affirmative burden to produce evidence concerning each and every *Carr* factor, the Federal Circuit has held that failure to produce such evidence if it exists "may be at the agency's peril," and "may well cause the agency to fail to prove its case overall." *Whitmore*, 680 F.3d at 1374.

¶24 Weighing the *Carr* factors, we do not find that the agency has proved by clear and convincing evidence that it would have suspended the appellant for 3 days absent his protected disclosures. Rather, we find that the relatively weak evidence in support of TSM Doe's harassment complaint, the agency's decision to

suspend the appellant, and *Carr* factor 3, is far outweighed by the strong motive to retaliate on the part of TSM Doe and any motive to retaliate on the part of the proposing and deciding officials. *See Miller v. Department of Justice*, 842 F.3d 1252, 1263 (Fed. Cir. 2016) (noting that the agency's clear and convincing burden is a "high burden of proof" that Congress demanded in cases when the employee has already shown that whistleblowing was a contributing factor and the burden shifts to the Government to show independent causation). Accordingly, we reverse the initial decision in part and grant the appellant's request for corrective action with respect to his 3-day suspension.

ORDER

¶25 We ORDER the agency to cancel the appellant's 3-day suspension and remove all references to the suspension from the appellant's personnel records. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶26 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶27 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it has taken to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶28 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶29 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set forth at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees and costs WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion for attorney fees and costs with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL AND/OR COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.204.

In addition, the Whistleblower Protection Enhancement Act of 2012 authorized the award of compensatory damages including interest, reasonable expert witness fees, and costs, 5 U.S.C. § 1214(g)(2), which you may be entitled to receive.

If you believe you are entitled to these damages, you must file a motion for consequential damages and/or compensatory damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE PARTIES

A copy of the decision will be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D). 5 U.S.C. § 1221(f)(3). Please note that while any Special Counsel investigation related to this decision is pending, "no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel." 5 U.S.C. § 1214(f).

NOTICE OF APPEAL RIGHTS[15]

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

[15] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's

disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[16] The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

---

[16] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

DEFENSE FINANCE AND ACCOUNTING SERVICE
Civilian Pay Operations

DFAS BACK PAY CHECKLIST

The following documentation is required by DFAS Civilian Pay to compute and pay back pay pursuant to 5 CFR § 550.805. Human resources/local payroll offices should use the following checklist to ensure a request for payment of back pay is complete. Missing documentation may substantially delay the processing of a back pay award. **More information may be found at: https://wss.apan.org/public/DFASPayroll/Back%20Pay%20Process/Forms/AllItems.aspx.**

NOTE: Attorneys' fees or other non-wage payments (such as damages) are paid by vendor pay, not DFAS Civilian Pay.

☐ 1) Submit a **"SETTLEMENT INQUIRY - Submission"** Remedy Ticket. Please identify the specific dates of the back pay period within the ticket comments.

Attach the following documentation to the Remedy Ticket, or provide a statement in the ticket comments as to why the documentation is not applicable:

☐ 2) Settlement agreement, administrative determination, arbitrator award, or order.

☐ 3) Signed and completed "Employee Statement Relative to Back Pay".

☐ 4) All required SF50s (new, corrected, or canceled). *****Do not process online SF50s until notified to do so by DFAS Civilian Pay.*****

☐ 5) Certified timecards/corrected timecards. *****Do not process online timecards until notified to do so by DFAS Civilian Pay.*****

☐ 6) All relevant benefit election forms (e.g. TSP, FEHB, etc.).

☐ 7) Outside earnings documentation. Include record of all amounts earned by the employee in a job undertaken during the back pay period to replace federal employment. Documentation includes W-2 or 1099 statements, payroll documents/records, etc. Also, include record of any unemployment earning statements, workers' compensation, CSRS/FERS retirement annuity payments, refunds of CSRS/FERS employee premiums, or severance pay received by the employee upon separation.

Lump Sum Leave Payment Debts: When a separation is later reversed, there is no authority under 5 U.S.C. § 5551 for the reinstated employee to keep the lump sum annual leave payment they may have received. The payroll office must collect the debt from the back pay award. The annual leave will be restored to the employee. Annual leave that exceeds the annual leave ceiling will be restored to a separate leave account pursuant to 5 CFR § 550.805(g).

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:

    a. Employee name and social security number.
    b. Detailed explanation of request.
    c. Valid agency accounting.
    d. Authorized signature (Table 63).
    e. If interest is to be included.
    f. Check mailing address.
    g. Indicate if case is prior to conversion. Computations must be attached.
    h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected (if applicable).

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement (if applicable).
2. Copies of SF-50s (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

    a. Must provide same data as in 2, a-g above.
    b. Prior to conversion computation must be provided.
    c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.